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COMMITTEE ON JUDICIARY  
January 20, 2006  
LB 1014, 1001, 824, 825

The Committee on Judiciary met at 1:30 p.m. on Friday, January 20, 2006, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 1014, LB 1001, LB 824, and LB 825. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: Ernie Chambers.

SENATOR BOURNE: Welcome to the Judiciary Committee. This is our third day of hearings. We'll hear four bills today. I'm Pat Bourne. I'm from Omaha. To my left is Senator Flood from Norfolk; Senator Friend from Omaha; the committee clerk is Laurie Vollertsen; the legal counsel is Michaela Kubat, also from Omaha; to my right is Senator Foley from Lincoln; and Senator Pedersen from Elkhorn. I'll introduce the other members as they arrive. Please keep in mind that the members of the committee will come and go throughout the day conducting legislative business. Please don't take it personally if they get up and leave while you're giving your testimony. They're simply taking care of other legislative matters. If you plan on testifying on a bill today, we're going to ask that you sign in in advance on that table there with the yellow sign. Please print your information so that it's easily readable and can be entered into the permanent record. Following the introduction of each bill, I'll ask for a show of hands to see how many people plan to testify on a particular measure. We'll first have the senator introduce the bill, then we'll take proponent testimony, then opponent testimony, then any neutral testimony. When you come forward to testify, please clearly state and spell your name for the record. All of our hearings are transcribed, so your spelling of your name will help the transcribers immensely. Due to the large number of bills we hear here in Judiciary Committee, we have 90 this session, we're utilizing the Kermit Brashear memorial lighting system, which you see on the testifiers table in front of me. Senators introducing the bill get five minutes to open and three minutes to close, if they choose to do so. All other testifiers get three minutes to speak exclusive of questions that the committee may ask. The blue light goes on at three minutes, the yellow light comes on as a one-minute warning, and then when the red light comes on, we ask that you stop your testimony. The rules of the

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legislature state that cell phones are not allowed, so if you have a cell phone, please disable it so you don't interrupt other people. Also, reading someone else's testimony is not allowed. If you have somebody else's testimony, we'll allow you to enter that into the record. We'll make that a part of the record, but we won't allow you to read that. With that, we've been joined by Senator Aguilar from Grand Island. Here to open on Legislative Bill 1014 is Senator Cunningham. As he makes his way forward, can I have a show of hands of those folks here wishing to speak in support of this bill? And again, I see two. And again, if you'd make your way forward to the front row and sign in. Are there any opponents to this bill? Any neutral testifiers? I see none. Looks like all support today, Doug.

SENATOR CUNNINGHAM: That's what I need. (Laughter)

SENATOR BOURNE: With that, Senator Cunningham. Welcome.

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SENATOR CUNNINGHAM: (Exhibits 1, 2, 3, and 4) Well, thank you, Senator Bourne and members of the Judiciary Committee. My name is Doug Cunningham, C-u-n-n-i-n-g-h-a-m, state senator representing the 40th Legislative District. I'm here today to introduce LB 1014, which increases the jurisdictional limit for small claims court from \$2,700 to \$4,000 as of July 1, 2006. Now if you look at the section of statute that pertains to the jurisdictional limit of the small claims court, Section 25-2802, you will note that the last amount listed was \$2,400, which was valid through June 30, 2005. This past summer, the Nebraska Supreme Court raised the small claims court jurisdictional amount from \$2,400 to \$2,700 effective July 1, 2005, in compliance with Nebraska statutes that direct them to adjust the amount every fifth year in accordance with changes in the Consumer Price Index. Under LB 1014, the next adjustment would occur in four years, after which adjustments would take place again every five years. As you can see on the chart that I have distributed, out of the 49 states and the District of Columbia that have some type of small claims court, Nebraska currently ranks 45th. Only five states have jurisdictional limits lower than Nebraska. By increasing the limit to

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\$4,000, it would raise Nebraska up to between the 31st and the 33rd rung among the states. Although Nebraska is somewhat unique in that an adjustment in the jurisdictional limit is made every five years in accordance with the Consumer Price Index, based on the last adjustment made, and if future adjustments were an equal percentage, it would take almost 20 years for the jurisdictional limit to reach the \$4,000 figure. Now, typical examples of possible small claims would be neighbors that agree to share the cost of a fence between their yards, and then one neighbor refuses to pay. Or an appliance or a car will not work properly, and the dealer refuses to repair it or to refund any of the money. With ever increasing costs, many of these typical cases that would go to small claims court now fall above the jurisdictional limit set by law. The intent of LB 1014 is to help the low and moderate income Nebraskans that need legal help, but cannot afford an attorney, or those citizens or businesses that have legal problems that don't warrant the cost of an attorney. Small claims courts offer the common citizen a means to handle their routine legal needs. However, our small claims court current jurisdictional limit is restricting its use. I believe that an increase in the jurisdictional limit in Nebraska is warranted. And I would answer any questions if you have any.

SENATOR BOURNE: Thank you. Are there questions for Senator Friend? Sorry, it's late Friday afternoon, Senator Cunningham. Senator Friend, see, it was like tele-something or other. Senator Friend.

SENATOR FRIEND: Yesterday was "Abuse Friend Day," so, or "Friend Self-abuse Day," let's put it that way. Hey, Senator Cunningham, and I asked this a couple of times today. We kind of knew this was coming, and you alluded to it briefly in your opening. Why not more? I mean, you know, why not take a smaller bite of the apple, 32? I mean, is \$4,000 just a round number? I mean, what's the CPI going to do to that? I really, firmly don't believe that we should, even though I think we're better than Delaware, I mean \$15,000 is kind of a crazy thing. What's the CPI going to do and why was the number, I guess, selected, is what I'm saying?

SENATOR CUNNINGHAM: Why was the \$4,000 selected?

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SENATOR FRIEND: Yeah, yeah.

SENATOR CUNNINGHAM: Well, quite frankly, I brought this bill after discussions with a constituent. And to be honest with you, the constituent would have liked it to have been \$10,000. And I didn't, and I talked to a couple of you on the committee and didn't really see the possibility that I could get it through this committee at \$10,000, so we just picked a lower number. But when we did the research, you know, it's apparent that even at the lower number that we picked, we're still not going to be high in comparison with other states.

SENATOR FRIEND: And how many of the other states have a CPI incorporated into their, did you speak to that in your opening?

SENATOR CUNNINGHAM: Yes.

SENATOR FRIEND: Sorry.

SENATOR CUNNINGHAM: We don't know for sure how many, but we think we are quite unique, and there aren't a lot of them. They just have to go legislatively and raise that amount.

SENATOR FRIEND: Okay.

SENATOR CUNNINGHAM: But at the current amount of \$2,700, using the CPI as it was the last time around, it would take about 20 years to get it up to the \$4,000.

SENATOR FRIEND: Okay. Thanks.

SENATOR BOURNE: Further questions? Senator Cunningham, have you consulted the Supreme Court? Have you talked to them about this?

SENATOR CUNNINGHAM: We haven't...

SENATOR BOURNE: Because, I mean, this is under their purview.

SENATOR CUNNINGHAM: I don't believe we've consulted the Supreme Court.

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SENATOR BOURNE: Okay. Further questions? Seeing none, thank you.

SENATOR CUNNINGHAM: Thank you.

SENATOR BOURNE: Next testifier in support, or first testifier in support.

KELLY HODSON: Senator Bourne, members of the committee, my name is Kelly Hodson, H-o-d-s-o-n. I'm from Osmond, Nebraska. My wife and I are small business owners in Osmond, and I am actually the one that persuaded Senator Cunningham to introduce the legislation, and I just firmly believe that the amount is too low. You can look at the surrounding states and you can see that we are way lower than all of them. And in order to make small claims effective, it has to be, you know, applied to enough cases to be used. And of course, this is something that cuts both ways. I'm in the retail building materials business. If I sell a house full of windows to a customer and he's unhappy, you know the cost of those windows is going to exceed the current limit, and he has to hire an attorney. So it's not only for my benefit, I think. I think it applies to consumers as well, and I quite frankly would like to see it higher than the \$4,000 that's been proposed. And I'm here in support of the bill.

SENATOR BOURNE: Thank you. Questions for Mr. Hodson? Mr. Hodson, how many cases do you estimate that you would have been able to file in the court, you know, between the difference of \$2,400, the current amount, and the recommended amount in the bill?

KELLY HODSON: I would guess that there's three or four a year that I would do, you know, if the amount would be increased three or four more.

SENATOR BOURNE: What do you spend in attorney fees for a case that's over the current \$2,400?

KELLY HODSON: Oh, it can run from \$1,000 to \$3,000 pretty easy.

SENATOR BOURNE: Hardly justifies bringing the suit.

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KELLY HODSON: And that's the problem.

SENATOR BOURNE: Yeah. Further questions? Thank you.

KELLY HODSON: (Exhibit 5) I have additional written testimony from Bruce Curtis in Plainview, and I would introduce that if I may.

SENATOR BOURNE: We'll make that part of the record. Thank you.

KELLY HODSON: Thank you for your time.

SENATOR BOURNE: Thank you. Appreciate your testimony. Next testifier in support.

KIM ROBAK: Senator Bourne and members of the committee, my name is Kim Robak, R-o-b-a-k. I am here today on behalf of the Nebraska State Bar Association. The Nebraska State Bar Association supports LB 1014 for the reason that it allows individuals the opportunity to go to court on matters that are not cost-effective to hire an attorney as the prior testifier indicated. In particular, you should note that there is concurrent jurisdiction, or two courts would actually have jurisdiction over this amount. So you would have an option to go to county court if you wanted to and pay an attorney to handle your matter, or you could go to small claims court without the assistance of an attorney. It gives you that option, and so it's appropriate at this level to raise the amount to \$4,000 for the benefit of the individual who has a matter without paying an attorney. That we go on record in support.

SENATOR BOURNE: Thank you. Questions for Ms. Robak? Senator Aguilar.

SENATOR AGUILAR: Yeah. Ms. Robak, would the Bar Association have any objection to an even larger amount than \$4,000?

KIM ROBAK: Senator, that I can't tell you. I know that the \$4,000 amount seemed reasonable at the time. I don't know whether or not a higher amount is okay with the bar. I do know that the cost of living, the CPI factor, is okay with them as it exists in the current bill right now, current

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statute.

SENATOR AGUILAR: Comfortable with that. Thank you.

SENATOR BOURNE: Further questions? Ms. Robak, can I ask you a quick one? You mentioned that there's concurrent jurisdiction, but is there also the ability for the person being sued in small claims court to move to a different court?

KIM ROBAK: There is. Yes, there is. You can...

SENATOR BOURNE: No matter the amount of dispute?

KIM ROBAK: I believe that is the case, Senator Bourne, that you can take the matter up into the county court and to...

SENATOR BOURNE: So do you think that as that dollar value goes up, the amount in controversy goes up, we'll see more transferred to the county court?

KIM ROBAK: It depends on the types of cases that go to small claims court. I don't know that you'll see a lot. Many of the cases that go to small claims courts are matters, collection matters, where people don't want to pay the cost of an attorney. Although there are numerous different types of disputes, but again, if the dollar amount gets high enough, you would probably see them being elevated in the county court.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

KIM ROBAK: Thank you, Senator.

SENATOR BOURNE: Other testifiers in support? Testifiers in opposition? Neutral testifiers? Senator Cunningham to close.

SENATOR CUNNINGHAM: Just real briefly, Senator Bourne. I did talk to my legislative aide, Kim, and she had been in contact with the Supreme Court, or Ken Wade from the State Court Administrator's Office, and we had ran the \$10,000 figure by them, and he thought that would be too high. But we just notified them that the figure we went with was the

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\$4,000, but he did think \$10,000 was too high.

SENATOR BOURNE: And you haven't heard objections from them?

SENATOR CUNNINGHAM: Not to my knowledge, no. And I'd just like to stress this does work both ways. I know many times people look at it as it's a business collection bill, but it, by the same token, any private citizen that has a dispute with a business or a neighbor or whatever it may be, this is a way for them to go to court and try to get their voice heard without having to spend, as Mr. Hodson noted, in a case for him, it's \$1,000 to \$3,000. And many of our citizens, there is no way that they can afford to do that.

SENATOR BOURNE: Further questions? Seeing none, thank you.

SENATOR CUNNINGHAM: Thank you.

SENATOR BOURNE: That will conclude the hearing on Legislative Bill 1014. Senator Synowiecki to open on Legislative Bill 1001. Can I have a show of hands of those individuals here testifying in support of LB 1001? I see two. Those in opposition? I see none. Welcome.

LB 1001

SENATOR SYNOWIECKI: (Exhibit 6) Senator Bourne, members of the Judiciary Committee, my name is John Synowiecki. I represent District 7 from Omaha. I bring LB 1001 for your consideration, a bill to change provisions of the Nebraska evidence rules with respect to privileged communication. LB 1001 would provide nurse practitioners with the same right to privileged confidential patient communication that is currently accorded to medical doctors and psychologists. Nurse practitioners are highly qualified medical professionals. Nurse practitioners must meet the requirement of the licensed registered nurse in the state. They must complete an approved, nationally accredited master's or doctoral program in the clinical specialty area of a nurse practitioner practice. In addition, they must obtain 30 contact hours of education relating to the use of drugs to treat diseases and pass a board-approved examination pertaining to the specific nurse practitioner role in nursing. Before nurse practitioners can enter a



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practice agreement with a physician, they must complete 2,000 hours of practice under the supervision of a physician. All nurse practitioners must meet requirements for continuing competency. These highly qualified medical professionals are a critical ingredient within the continuum of healthcare in Nebraska, especially in mental health treatment areas. Psychiatric mental health nurse practitioners routinely diagnose and counsel patients and prescribe appropriate medication. This counseling often involves highly sensitive and personal patient issues. A core component of the effectiveness of this counseling and treatment is trust. Patients must be able to trust that the information they disclose to their mental health provider is confidential except where legally mandated. In Nebraska, most other psychiatric mental health providers are already included in privileged communication statute. This legislation gives psychiatric mental health nurse practitioners parity. Section 1 of LB 1001 includes nurse practitioners in the definition of medical professionals that are covered by the privileged communication protection. Section 2 of this bill includes language specific to the confidential communications between a nurse practitioner and a patient. This language in Section 2 is modeled after Statute 71-1,206.29, which relates to the confidential communications between a psychologist and a patient. There will be others testifying after me who can give you a better understanding of why the protection of privileged patient communication is needed in their practice. I want to thank you, Senator Bourne and members of the committee, for your attention to this important matter.

SENATOR BOURNE: Thank you. Are there questions for Senator Synowiecki? Seeing none, thank you.

SENATOR SYNOWIECKI: Thank you.

SENATOR BOURNE: First testifier in support?

JOYCE SASSE: Senator Bourne and members of the committee, my name is Joyce Sasse. I am a psychiatric nurse practitioner and clinical nurse specialist. For the last three years, I have been practicing as an independent provider of psychiatric services under the supervision and with collaboration from my physician partner, Dr. Battafarano. Every day, I talk with patients about

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matters going from sexual identity to bizarre ideation, illusions, hallucinations. These are people like you and I who suffer from a mental illness. Just because I am a nurse practitioner, at this point, by law, in the state of Nebraska, my communication is not covered under part of this bill. This bill would cover it and bring us in line with HIPAA. I think it's important that we recognize that nurse practitioners, especially in the psychiatric area, provide an important service to the people of Nebraska and that their communication should be private so that the patient can feel comfortable in working with me and my other colleagues as nurse practitioners. I represent today the Nebraska Nurses Association, the Nebraska chapter of the Association of Psychiatric Nurses and myself as a private practitioner. Thank you so much.

SENATOR BOURNE: Thank you. Are there questions for Ms. Sasse? Senator Pedersen.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Ma'am, under your current practice, you're not covered? I mean, you have...

JOYCE SASSE: Not by this law in Nebraska, no. I am covered by HIPAA.

SENATOR DW. PEDERSEN: How would this change with...

JOYCE SASSE: It would give recognition to the fact that we are a primary care provider and that our communication with our patients is every bit as protected as that of a physician.

SENATOR DW. PEDERSEN: Does this mean that you would not have to give information to the physician that is overseeing you?

JOYCE SASSE: Absolutely not. That is a communication that is between partners in a supervision situation. I may mention the patient's name, but I may go through the case with him. And it's very important that...

SENATOR DW. PEDERSEN: Would this protect the fact that you do not have to mention who the patient's name is?

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JOYCE SASSE: Yes, it would.

SENATOR DW. PEDERSEN: So this would be a broadening of the scope of your current practice, is that right?

JOYCE SASSE: It would not be a broadening of my scope of practice or of other nurse practitioners' practice. It would be a protection of the work we do.

SENATOR DW. PEDERSEN: Thank you.

JOYCE SASSE: You bet.

SENATOR BOURNE: Further questions? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Thank you for your testimony today.

JOYCE SASSE: You're welcome.

SENATOR FLOOD: I guess I did not realize that nurse practitioners weren't covered under the statute for privileged communications. This is just through the Nebraska rules of evidence, to conform into the language of the Nebraska rules of evidence, right?

JOYCE SASSE: Right.

SENATOR FLOOD: You know, recently, Hank Robinson, who you know wrote an excellent report about the need for methamphetamine treatment in Nebraska, he was talking about the number of substance abuse counselors that are available. Do substance abuse counselors, they don't have this same type of privilege communication?

JOYCE SASSE: No, they don't, unless they would be a nurse practitioner who also had specialized training. I am also certified as an addictions registered nurse, so it would fall...

SENATOR FLOOD: Do you think there's a need to include substance abuse counselors within this privilege communication? Because I would imagine there's a lot of information that comes out in the...

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JOYCE SASSE: I would say that you would probably, at some point, want to consider including them, physicians' assistants, and anyone who acts as a physician extender.

SENATOR FLOOD: You see, I kind of thought provider-patient restricted communication through the rules of evidence included anybody within the medical field, and I realize it's the physician and the patient, but I didn't realize it didn't extent down to those that work under the supervision of a physician. Then I thought about the counselors.

JOYCE SASSE: We are covered under HIPAA, we get that. And that's the national law, and we go by the most conservative law, of course, for anything, but we would like Nebraska to recognize.

SENATOR FLOOD: Have you had any situations where this has become an issue, especially in a courtroom experience?

JOYCE SASSE: Not at this point. I've always had permission of the patient to give testimony, and have been asked by the patient to give testimony. It's not a case where I've been subpoenaed.

SENATOR FLOOD: But if you were subpoenaed, you wouldn't have a choice if asked on the stand that you couldn't assert a privilege?

JOYCE SASSE: That's correct.

SENATOR FLOOD: You'd have to answer those questions?

JOYCE SASSE: Yes.

SENATOR FLOOD: Thank you very much.

JOYCE SASSE: Thank you.

SENATOR BOURNE: Further questions. I have a couple. Leaving HIPAA out of it...

JOYCE SASSE: Yes.

SENATOR BOURNE: ...okay, what medical providers under current state law enjoy the confidentiality privilege?

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JOYCE SASSE: Per this law, it seems to be only physicians and psychologists.

SENATOR BOURNE: Okay.

JOYCE SASSE: And they don't recognize whether it is a doctoral level psychologist or a master's level.

SENATOR BOURNE: Okay. When you were talking to Senator Pedersen, you indicated that, are nurse practitioners primary care providers now under law?

JOYCE SASSE: Yes, we are.

SENATOR BOURNE: Okay.

JOYCE SASSE: We take a board certification...

SENATOR BOURNE: But I mean, recognized under statute as a primary care provider today?

JOYCE SASSE: I believe we are.

SENATOR BOURNE: Okay. And the reason I'm asking is because if you look at, on page 2, the language, a physician is, and then it describes, (1) a person authorized to practice, (2) a person licensed as a psychologist, or (3) an advanced practice registered nurse. So it appears to me that you're asking for the statute to be changed to add you as a primary care provider.

JOYCE SASSE: In this statute, yes. But if you will look at our Nurse Practice Act and the information on what a nurse practitioner is in other Nebraska Law, you will see that we are providing these services.

SENATOR BOURNE: Again, but primary?

JOYCE SASSE: Primary, yes.

SENATOR BOURNE: Okay. Now bring HIPAA into this. What are your obligations regarding confidentiality of any personal health information under HIPAA, especially as it relates to the venue that you would be able to exercise this privilege

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should this bill pass.

JOYCE SASSE: HIPAA requires that I keep all privileged healthcare information absolutely private unless I have the consent of the patient or the patient's guardian in the case of that type of situation to release that information.

SENATOR BOURNE: So at some, at the federal level, anyway, to a certain regard, you enjoy the privilege that you're asking for here?

JOYCE SASSE: Yes, I do.

SENATOR BOURNE: Okay. Further questions? Seeing none, thank you for your testimony. Appreciate it.

JOYCE SASSE: Thank you so much.

SENATOR BOURNE: Next testifier in support?

KIM ROBAK: Senator Bourne and members of the committee, my name is Kim Robak, R-o-b-a-k. I'm here today on behalf of the Nebraska State Bar Association in support of LB 1001. In Nebraska law, all of the rules of evidence are put in statute so that when you go into court and try and figure out how you're going to present evidence to a judge, you can look in statute as opposed to just, on the federal side, on the federal rules of evidence. They're actually codified in statute. One of the rules of evidence is the rule of privilege, which says, when I say something to somebody, they can't go into court and repeat it in certain circumstances because that information between a physician and a patient, between, I believe, between spouses, and in certain circumstances, that information is protected. It's safe, so that I feel comfortable giving this information to a certain person. In Nebraska, there is a patient-physician protection, and that says that when I go into a doctor's office and I say, you know what, I need to be treated for something that, I say to the doctor, and I want you to know that I have been smoking marijuana, or I've been taking drugs, so that the doctor can treat me. But then I don't have to worry that the doctor is going to testify against me in a court of law. In many places across the state of Nebraska, the only medical treatment available would be a nurse practitioner. And in those instances, for the

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purposes only, of our statutes involving privilege, a nurse practitioner would be considered a physician for purposes of the privilege. It doesn't change what a nurse practitioner is in any other instance. It doesn't change the law as to how a nurse practitioner practices or the scope of practice. It simply says that when I go into an office and a nurse practitioner treats me, or I believe that somebody is a nurse practitioner, when I communicate with that individual, the conversation between the two of us is protected. And for that reason, the Nebraska State Bar Association supports LB 1001.

SENATOR BOURNE: Questions for Ms. Robak? Seeing none, thank you. Next testifier in support. Testifier in opposition? Neutral? Just to clarify, there are no opponents to the bill? Welcome.

DAVID BUNTAIN: (Exhibit 7) Thank you, Senator Bourne, members of the committee. My name is David Buntain, B-u-n-t-a-i-n. I'm an attorney and I'm the registered lobbyist for the Nebraska Medical Association. And we have not had our legislative commission meeting, won't meet until Monday, so we have not taken a position on the bill itself. I expect that we will continue to be neutral on the underlying bill. We do have a concern about the way this is drafted, and it's not really this group's fault, but because the problem is in the statute the way it is. And that is we're talking about the physician-patient privilege. This originally started as the physician-patient privilege, and it's modeled on the federal rule of evidence. It has been amended previously to include psychologists within the definition of physician, and LB 1001 proposes to expand the definition of physician to include nurse practitioner. We do not think that is good draftsmanship, and it's really something that could be corrected very simply. And so what I have done is given you a proposed draft where we would break out physicians, psychologists, and nurse practitioners, and then carry that through the rest of the statute. This really is the section of the rule of evidence that were talking about. I've omitted the second section of LB 1001. I'm not quite sure why that's in there. I don't know that it, I don't think it's necessary, but that's not....we don't have a position one way or the other on the second section. I just wanted to clear up one thing. There was a question as to who has the privilege currently, and

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it's physicians and psychologists, but there's also privilege for professional counselors. If you look at, under this draft, it would be new (f), "a professional counselor is person certified as a professional counselor," and if you go down and read through it then, the communications that are privileged are both physicians and professional counselors. So that would be the other example. And I think Senator Flood has put his finger on an issue that, you know, long term, there may be others that should fit here, but I guess we approach those as they come along.

SENATOR BOURNE: Questions for Mr. Buntain? Senator Flood.

SENATOR FLOOD: Chairman Bourne: Thank you, Mr. Buntain, for your testimony. I guess one of my questions is if you take this away from the physician-patient privilege, let's look at the attorney-client privilege. I guess I'd never thought about it, but the client walks into the law office, they talk to the receptionist about their problem, then they go talk to maybe a law clerk about their problem, and then a secretary or administrative assistant is present with the client when they sign their will or make a declaration that they're going to cut "Sonny" out of the will, and...are these rules meant to be broadest to the entire industry, you know? And I guess, how specific do we need to be if we're going to do it right this time? Would it be any provider of, you know, medical or psychological services? And any provider of legal services? Isn't that the intent, just to make sure there's just like a bubble around people inside that? Or, well, I guess why would you not subpoena the nurse that was present during the operation and have her testify as to what she saw going on?

DAVID BUNTAIN: Why, I think people do, and...that sort of information, the kind of information that's reported in medical records, those kinds of things are subject to discovery. I mean, this is a very, or can be a very contentious area because you're trying to strike a balance between encouraging people to be candid with their physician or attorney. We also have a privilege for clergy, communications with clergy. You want to protect that, but on the other hand, you want to be able to discover information that's relevant to it. And so, I do think that the kind of extender you're talking about, a law clerk, for



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example, or staff would, I mean, depending on the circumstances would likely fall under the attorney-client privilege. If you look at this statute, for example, the communication is confidential if not intended to be disclosed to third parties other than those present to further the interests of, and it says the patient, in the consultation or examination or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment. So I think it is broader than just the persons that are mentioned here even under current law.

SENATOR FLOOD: But in this case, we're talking about a nurse practitioner that would see the patient one-on-one without the presence of a physician.

DAVID BUNTAIN: That's correct. And I think there is a concern there. And your prior speaker was correct. Nurse practitioners are, under their scope of practice, primary care practitioners. They are required to have practice agreements with physicians, but it doesn't provide for direct physician supervision. It provides for consultation relationships.

SENATOR FLOOD: Thank you very much.

SENATOR BOURNE: Further questions? Seeing none, thank you.

DAVID BUNTAIN: Thank you.

SENATOR BOURNE: Other testifiers in a neutral capacity? Senator Synowiecki to close.

SENATOR SYNOWIECKI: I'll just very briefly, Senator Bourne, the amendment that was brought to you by Mr. Buntain isn't, we have no, the Nebraska Nurses Association has no problems with that direction. It appears as though that there may be some more, well, this bill, LB 1001, deal with the nurse practitioner. If the committee wanted to take a more universal look at the privilege communication in our state and practitioners, I think we would welcome that. And if you want to get a more broader approach to this, if it is found by this committee to be needed, I'd be willing to participate with the committee in bringing that about. Thank you.

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SENATOR BOURNE: Thank you. Questions for...thank you.  
That will conclude the hearing on Legislative Bill 1001.

SENATOR DW. PEDERSEN: Ready? We'll now open the hearing on  
LB 824. Senator Bourne will present.

LB 824

SENATOR BOURNE: Is it LB 824, Dwite?

SENATOR DW. PEDERSEN: LB 824.

SENATOR BOURNE: Good afternoon, Senator Pedersen and members of the Judiciary Committee. My name is Pat Bourne. I represent the 8th Legislative District in Omaha, here today to introduce Legislative Bill 824. This bill was brought to me by the Nebraska County Judges Association following their review of existing laws, which they believe have become archaic or need to be harmonized or updated. The first section of the bill makes the term of court for county courts the same as district courts. Presently, county courts have one-month terms. The only impact this change would have is on default judgments and the grounds upon which they may be set aside. With county courts having greatly expanded monetary jurisdiction, the need is more pressing for terms matching the district courts. Inclusion of the Court of Appeals in this section is simply to correct an oversight which dates back to that court's creation. Section 2 makes clear that county courts have the same power to modify their judgments in juvenile matters as they presently have in other cases. There was a case by the Court of Appeals which held that separate juvenile courts did not have power to vacate or modify their judgments, and this would clarify that county courts, when sitting as juvenile courts, would have such power. Section 3 would allow county courts to issue search warrants throughout the state. Currently, county courts may only issue warrants within their district. County courts are the primary warrant courts and often cross judicial district lines with joint operations. It would simplify the process if a county judge could issue a warrant which can be executed anywhere in this state. The primary purpose is to remove a limitation which dates back to when county judges were not

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lawyers. Section 4 would modernize the methods for issuing a warrant. The bill would authorize the use of fax machines or other electronic means for the submitting of affidavits and warrants. It is my understanding that fax machines are regularly used in the rural counties. Not updating the statute could result in the failure of a major because of the existing language. This section further allows a person filing a warrant affidavit to have his or her signature witnessed by a notary, clerk magistrate, or court reporter as a notary. This change would ensure that more lawyer judges would be involved in the issuing of warrants than clerk magistrates. Section 5 is harmonizing language and Section 6 again clarifies that separate juvenile courts and county courts when sitting as a juvenile court have the power to modify judgments in the same manner as a district court. With that, Senator Pedersen, that is my opening.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Any questions from the committee for Senator Bourne? Seeing none, first testifier please take the stand. This is testimony in favor of LB 824.

PATRICK McDERMOTT: Thank you, Senator Pedersen, members of the committee. My name is Patrick McDermott, M-c-D-e-r-m-o-t-t. I'm a county judge of the 5th Judicial District, and I am appearing on behalf of the Nebraska County Judges Association. It was at our behest that Senator Bourne introduced this bill. His statement of intent mirrors exactly the discussion among our organization. It is our hope that nearly on an annual basis that county judges are being invited throughout the state to submit to the Nebraska County Judges Association those things that they encounter in statute which are antiquated, which can be obstructive to justice, and which result when we do amendments of statutes invariably cause another problem with another statute. We're the ones that encounter this stuff day after day. I wouldn't expect a state senator to have the opportunity to review that law. But as we encounter these things, we're going to try and bring them forward for your consideration to see if we can improve the delivery system of justice. The term of the county court that we're recommending, right now it's a one-month term, which goes back to the old days when it was circuit judges, and they went and they sat someplace, they did their business, they closed the term, and moved on to another

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location. It really has only the impact in our statute at present on default judgments. If they are asked to be withdrawn or vacated during term, there is almost a matter of right. If it's after term, there, you have to allege certain defects of the process. And to be honest with you, that doesn't happen in reality. If someone comes forward within a reasonable time and asks to have a default judgment set aside, nearly every judge I know will do so because it, the law does not like granting judgments by default because we want people to have an opportunity to respond. The most important part of this particular thing is search warrants. West of Grand Island, it's pretty much uniform practice that search warrants can be submitted, the affidavit to a judge, by fax machine. And that's done under Rule 11 of the Supreme Court rules that allows fax pleadings. Your statute right now is very specific on issuance of search warrants, either for the judge or by a very specific oral communication, telephonic, with a tape recorder, all kinds of requirements. There is a rule of law that says the particular governs the general. Where the Legislature has spoken to a particular method, it may by implication exclude other methods. So what we're trying to do is simply modernize search warrant practice so that we recognize that facsimile, e-mail, all kinds of electronic transmissions are regularly used. We don't want to lose a major case because we run into this as a technical barrier. The last thing is the case that Senator Bourne referenced was In re Anton C., was simply a recognition by the appellate court that courts of limited jurisdiction, which we are and separate juvenile courts are, only have the authority which you, the Legislature, give us. There is no specific authority for us to vacate or modify juvenile court judgments. I think that was just an omission, an oversight. We would hate to have to go to the appellate court on a fairly simple kind of error that could be readily corrected at the trial court, and not put parties to the expense of an appeal. That, in a nutshell, is the theories behind LB 824. I'd be happy to answer any questions that senators might have.

SENATOR Dw. PEDERSON: Thank you, Judge McDermott. Are there any questions from the committee? Seeing none, next testifier in support.

KIM ROBAK: Senator Pedersen and members of the committee, my name is Kim Robak, R-o-b-a-k. I am here on behalf of the

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Nebraska State Bar Association in support of LB 824. First of all, we'd like to thank the Nebraska County Judges Association for taking the time to look at the statutes and to modernize them. They make the practice of law easier for lawyers across the state, and we thank Senator Bourne for bringing the bill before you today to do that. And we want to go on record in support of the bill.

SENATOR DW. PEDERSEN: Thank you, Ms. Robak. Any questions from the committee? Seeing none, thank you. Next testifier in support.

JO PETERSEN: Good afternoon. My name is Jo Petersen, Petersen is P-e-t-e-r-s-e-n. I am the deputy Butler and Hamilton County attorney and I represent the Nebraska County Attorneys Association in support of this bill. As prosecutors, we support this bill because it allows for the timely and efficient obtaining of search warrants. It allows an officer to obtain and prepare an affidavit, sign it in front of a notary, fax it to a judge with the warrant, and have the judge sign it and fax it back if it's found to have the sufficient probable cause. That allows officers to timely be able to go back in and seize evidence of criminal activity. That is something that right now in rural counties takes some time. If they have to travel to a judge, get it signed, and then get it back, they lose a great deal of time in obtaining a search warrant. The process set forth in LB 824 does not in any way undermine the determination of probable cause or the integrity of the warrant in any way. It doesn't compromise the issuance of a warrant. It just allows us to do it in a much more timely and efficient manner, and as such, as an association, we support this bill. Thank you.

SENATOR DW. PEDERSEN: Thank you, Ms. Petersen. Any questions from the committee? Seeing none. Any other testifiers in support? Any testifiers in opposition? Anybody to testify neutral? Seeing none, Senator Bourne waives, and that will close the hearing. We will now open the hearing on LB 825. Senator Bourne here to introduce.

LB 825

SENATOR BOURNE: Good afternoon, Senator Pedersen and

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members of the Judiciary Committee. My name is Pat Bourne, I represent the 8th Legislative District in Omaha, here today to introduce Legislative Bill 825. LB 825 would amend the infectious disease statutes to include school district employees. This change would afford these employees the same protection as emergency service providers who suffer a significant exposure while rendering emergency services. LB 825 was brought in response to a situation where the ward of the state assaulted a teacher, and the Department of Health and Human Services refused to allow for a diagnostic blood test to be performed on the perpetrator. I believe there's somebody who will be following my opening that will go into more detail regarding the incident and the need for this bill. LB 825 further clarifies that the district court has exclusive jurisdiction when a petition is filed ordering a test and waives sovereign immunity when the state serves as guardian in such cases.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Does anybody have questions from the committee? Seeing none, could we have the first testifier in support?

SCOTT NORBY: Mr. Chairman, members of the committee, my name is Scott Norby, N-o-r-b-y, and I'm an attorney. I represent the Nebraska State Education Association, and I am appearing on behalf of the NSEA in favor of LB 825, which proposes to include school district employees within that class of individuals in which current Nebraska infectious disease laws offer protection when an individual suffers a significant exposure to the bodily fluids of another. As a teachers advocate, I would estimate that I become aware at least three or four times a year when a school district employee in the line of duty suffers a significant exposure of that nature. And it can come in a variety of ways, trying to break up a fight, a student gets a cut, a teacher is assaulted, those kinds of situations. Current law protects law enforcement personnel, emergency service providers, even volunteer firefighters, and funeral directors. By offering them an opportunity to secure the consent of the individual from whom the significant exposure was suffered to secure a diagnostic blood test to see whether or not they have, indeed, been exposed to an infectious disease like hepatitis C or AIDS. Where consent is withheld, the law provides a mechanism by which those individuals can go to the district court and secure an order

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compelling the production of a diagnostic test when healthcare providers determine that necessary and appropriate for the treatment, if in fact an infectious disease is present. Right now, Nebraska's school districts employees are at risk. Because of the nature of their duties and responsibilities, the often come into contact with bodily fluids of others. And because the state law does not offer them the protections associated with that offered by other public servants, they simply have no remedy. Marilyn Cleveland, who will be speaking to you in a moment, is a teacher in Ogallala who suffered a significant exposure. I represented her in the process and in proceedings in the district court of Lancaster County, she was unsuccessful in her attempt to have the student tested because school district employees are not within the scope of the statutes. The state of Nebraska, who served as guardian for this student, raised numerous defenses, including sovereign immunity and jurisdiction and other grounds, which are also addressed in the statute, so that hopefully, upon adoption of this bill, Nebraska teachers, secretaries, and educational support service personnel will have the same protections offered to other public servants when they suffer a significant exposure in the line of duty.

SENATOR DW. PEDERSEN: Thank you. Any questions from the committee? Senator Foley.

SENATOR FOLEY: How would this bill relate to nonpublic schools?

SCOTT NORBY: Right now, the bill is drafted, Senator, to cover public school employees. So if the bill were adopted as presently before the committee, it would not include private school employees, although from our perspective, there's no reason why it shouldn't.

SENATOR DW. PEDERSEN: Senator Flood.

SENATOR FLOOD: Thank you, Senator Pedersen. My question, I guess, has to do with HHS. What were their exact reasons for why they wouldn't allow a ward of the state to be tested?

SCOTT NORBY: You know, I hesitate to speak for HHS in that regard, and perhaps there are those here that can. I know

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that the Attorney General's Office on behalf of HHS vigorously resisted Mrs. Cleveland's attempts to secure a diagnostic test. And again, I think they were concerned about confidentiality of the information in terms of student, and so forth. Candidly, we offered a stipulation or any other kind of protection they wanted. Our interest was not, obviously, to compromise the interest of the minor involved. We simply needed a blood test so that Mrs. Cleveland could, and her healthcare providers could determine the proper course of treatment. Evidence was provided, Senator, by her treating physicians as to the imperative nature of securing that information in order for her to be treated. Candidly, the district court of Lancaster County was very sympathetic. But in defense of the court and the judge at issue, the law simply did not extend its protections to school teachers. And therefore, the court felt unable, or without authority to grant the relief requested.

SENATOR FLOOD: What type of exposure was it?

SCOTT NORBY: Marilyn is going to speak to you in a moment, but she was bitten very severely by a student. She is a special education teacher.

SENATOR FLOOD: Did you (inaudible), and this is my last question, did you work with just the Health and Human Services workers in Ogallala area, or did this go all the way to the top of HHS?

SCOTT NORBY: All of the above.

SENATOR FLOOD: Thank you very much.

SENATOR Dw. PEDERSEN: Any other questions? Thank you, sir.

SCOTT NORBY: Thank you.

SENATOR Dw. PEDERSEN: The next testifier in support, please. Welcome.

MARILYN CLEVELAND: Good afternoon, Senator Pedersen, members of the committee. I'm Marilyn Cleveland, C-l-e-v-e-l-a-n-d. I'm a special education teacher with the Ogallala Public Schools and I've been a teacher for



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30 years. I'd like to thank you, Senator Bourne, for bringing LB 825 for us. I have no idea why my voice is shaking. About one year ago, on February 2, 2005, my life was forever changed because of what happened in my classroom. In the course of teaching, I gave instructions to a student, and he was sitting across the table from me. He became violent, he jumped across the table, came at me biting, hitting, and scratching. I was able to restrain him while my peer educators moved the rest of our students to another room for their safety. And I restrained him for his safety, my safety, and the other students' and other staff's safety. My student was a ward of the state. The foster mother picked him up from school. He was hospitalized later that afternoon. Later in the day when I dismissed almost all of my students, I went to the doctor. My doctor said I had suffered a significant exposure to the body fluids of this student who bit, scratched, and hit me, including possible blood and respiratory secretions, saliva that entered my body through the scratches and the bites and the breaks in the skin. As a result, I may have been exposed to an infectious disease or conditions involving hepatitis or HIV. In conversations with the foster mother and the stepmother of this child, I was assured that they would see to it that he was tested. HHS continued to refuse all requests to have him tested, so I asked NSEA for help. We did seek a court order to have the HHS decision overturned. It was refused. Teachers are not included in the law the way it's written now. As was previously mentioned, the Lancaster County District Court did deny our request. Now I have to have biannual blood tests for the rest of my life, so everyday I do face the gnawing concern, will my next blood draw be positive? I want to make sure that you do understand this is not an isolated situation. I've since been bitten by another student. The difference was this student lived with his mother. She expected to have him tested, and she did have him tested. I am appalled that the Nebraska HHS System does not protect the wards of the state. That child could have been as easily been infected by me as I could have been by him. Our children are not protected the way the law is written and the way the Nebraska Department of Health and Human Services is acting. As a mother and wife, I have a 17-year-old daughter that is concerned, will I have HIV or hepatitis from the kids that I teach doing the job that I love? I believe Nebraska teachers need this protection. I don't believe that John Q.

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Public in Nebraska understands that it's not given to their children who are attending school, to the teachers who are teaching in the schools, to your children, to your grandchildren. I'm here today to ask you to change the law, I'm sorry, the light went off, so that my colleagues throughout Nebraska do not have to live with what I have to live with the rest of my life. I urge you to support Senator Bourne's LB 825, and thank you, Senator Bourne.

SENATOR DW. PEDERSEN: Thank you, Ms. Cleveland. Is there questions from the committee? Senator Friend.

SENATOR FRIEND: Thank you, Senator Pedersen. Ma'am, thanks for the testimony. Just curious--where do you think, and I don't know how extensive your experience with and communication with Health and Human Services in regard to this issue, how extensive that it's been for you personally, but in your opinion as a citizen, as a taxpayer, as person who, you know, lives in this state, where do you think the ball, I guess, in a situation like this, was dropped? I mean, when, your guess, I'm asking?

MARILYN CLEVELAND: It went clear to the top. The secretary at HHS in Ogallala, when I called her to report my physician's concerns.

SENATOR FRIEND: You instigated part of this on your own....

MARILYN CLEVELAND: Correct.

SENATOR FRIEND: ...I mean, you, yourself, and then other administrators got involved when you ran into difficulty?

MARILYN CLEVELAND: Correct.

SENATOR FRIEND: So you yourself, you went as high as you could within HHS, as high as you, I guess, personally could, you felt?

MARILYN CLEVELAND: Right.

SENATOR FRIEND: I didn't mean to interrupt you, but I wanted to just hear.

MARILYN CLEVELAND: When I made the initial call to HHS,

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after I called the foster mother, the secretary felt sure that the child would be tested. The child was hospitalized later that day, did have blood draws for other reasons. The child's family has health history that causes me great concerns. Due to confidentiality, I can't share any of that, but I assure you, it causes me and my family great concerns.

SENATOR FRIEND: And you use the term "appalled." Did you feel like, as a citizen as a person who had to deal with this department that serves the people, that serves you in this state, did you feel you were being stonewalled? Is that the bottom line?

MARILYN CLEVELAND: Very much so, and I feel very, very strongly that our children in Nebraska that are wards of the state are not protected when HHS does not have them have the opportunity to see if they were even infected by me.

SENATOR FRIEND: Thanks.

SENATOR Dw. PEDERSEN: Any other questions from the committee for Ms. Cleveland?

SENATOR BOURNE: I have a quick question.

SENATOR Dw. PEDERSEN: Senator Bourne.

SENATOR BOURNE: Ms. Cleveland, thanks for coming all the way to Lincoln to testify. Let me ask you this. You mentioned the other individual, young person that bit you that was still with his natural family.

MARILYN CLEVELAND: Right.

SENATOR BOURNE: What if they had refused? I mean, what, maybe I should have asked the previous testifier, but what are your rights as it relates to a regular student still with his natural parents. Do you see what I'm asking?

MARILYN CLEVELAND: I see where you're coming.

SENATOR BOURNE: Yeah.

MARILYN CLEVELAND: The way the law is right now, I have no

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rights.

SENATOR BOURNE: So it's the same situation whether it's a, and I'm asking that, I wonder if we should...

MARILYN CLEVELAND: From visiting with other teachers across the state that have been in similar circumstances, it appears that if the student is living with their biological family, the family usually will agree to it out of concern for their own child.

SENATOR BOURNE: Sure. How many kids in your class, special ed kids, are wards versus still with their natural families? And if that's not the right word, I apologize, I don't...

MARILYN CLEVELAND: I would, my case load varies significantly, but quite often at least 50 percent of my students are wards of the state.

SENATOR BOURNE: Half of them tend to be. And to follow up on Senator Foley's question, because I see exactly where he's coming from, do you know, does HHS ever put special needs kids in private schools? I mean, what Senator Foley was asking about, extending that to parochial or private schools, and I'm just curious if this would ever come into play in that situation.

MARILYN CLEVELAND: All I can speak to are the children that I've worked with that are wards of the state. The only time I have seen them moved out of our public school was if they were moved to a residential or therapeutic placement.

SENATOR BOURNE: Okay. One thing I will tell you, this is the second hearing we've had this week, the third hearing we've had this week, and the second time that we've had somebody come in and outline what I would consider to be pretty significant problems within HHS.

MARILYN CLEVELAND: I know a lot of people in Ogallala that would be very glad to visit with you if you'd like to visit some more about that.

SENATOR BOURNE: Yeah. Thanks for your testimony.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Senator

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Aguilar.

SENATOR AGUILAR: Thank you, Senator Pedersen. Thank you for coming today and for your testimony. And I'm not sure if you can answer this, but I want to pose it as, I guess, a hypothetical question. If we were to pass this legislation, and since you testified that the young man did have a blood draw, do you think that your attorney could request the results of that blood draw retroactively?

MARILYN CLEVELAND: I have no idea. Until this happened, I've been teaching 30 years. 2005 was a year of first for me. It's the first time I've been beating, and I was bitten the second time. I assumed that we would be protected, and so I have no idea. Couldn't answer that.

SENATOR AGUILAR: Thank you.

SENATOR DW. PEDERSEN: Any other questions from the committee? Seeing none, thank you, Ms. Cleveland.

MARILYN CLEVELAND: Thank you.

SENATOR DW. PEDERSEN: Do I see any other testifiers in support? Testifiers in opposition? Neutral? Senator Bourne to close. Senator Bourne waives. That will close the hearing on all of our bill for today. Thank you all.